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No. 83-1127

In the Supreme Court of the United States

OCTOBER TERM, 1983

SEARS, ROEBUCK AND CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment on grounds of prosecutorial misconduct.

On February 26, 1980, petitioner was charged in a 13-count indictment returned in the United States District Court for the Central District of California with various offenses involving the overstating to custom agents of the price it had paid for television receivers purchased from Japanese manufacturers. Count 1 charged petitioner with conspiring to defraud the United States and to commit customs law violations, in violation of 18 U.S.C. 371. Counts 2-13 charged petitioner with entering imported merchandise into the commerce of the United States by means of false statements, in violation of 18 U.S.C. 542. Pet. App. 2a, 25a. On June 2, 1981, the day upon which the

jury trial was to commence, the district court dismissed the indictment on the ground of prosecutorial misconduct in presenting the case to the grand jury. The court of appeals reversed, finding that petitioner had failed to demonstrate that the prosecutor's misconduct abrogated petitioner's Fifth Amendment right to a grand jury indictment (Pet. App. 25a-38a; 719 F.2d 1386).[1]

Thereafter, on January 17, 1984, petitioner was charged in a superseding 13-count indictment returned by a different grand jury in the United States District Court for the Central District of California with conspiring to defraud the United States, in violation of 18 U.S.C. 371 (Count 1); and with making false statements with respect to the purchase price of television receivers, in violation of 18 U.S.C. 1001 (Counts 2-13).[2] On January 27, 1984, the United States moved to dismiss the original indictment because of the return of the superseding indictment. Petitioner opposed dismissal on that ground but urged dismissal under the supervisory power of the district court because of prosecutorial misconduct. On January 30, 1984, the district court took the motions to dismiss under submission.

Petitioner contends here (Pet. 4-9) that the court of appeals erroneously used a de novo standard to review the district court's decision to dismiss the original indictment for prosecutorial misconduct before the grand jury. Petitioner also contends (Pet. 9-11) that the court of appeals

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[1]Judge Norris dissented (Pet. App. 39a-41a). He would have remanded the case to the district court without prejudice to petitioner's right to renew its motion to dismiss the indictment on supervisory power grounds.

[2]While the government's appeal from the dismissal of the first indictment was pending, the court of appeals held that 18 U.S.C. 542 was inapplicable in a case quite similar to this one. *United States* v. *Teraoka*, 669 F.2d 577 (9th Cir. 1982).

applied a wrong standard in finding that there was no prejudicial prosecutorial misconduct justifying dismissal of the indictment. Contrary to petitioner's argument (Pet. 11-13), whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[3] The court of appeals' decision places petitioner in precisely the same position it would have occupied if the district court had denied its motion to dismiss. Beyond that, a superseding indictment has been returned, and both parties have filed motions to dismiss the original indictment. In these circumstances, any adverse effect resulting from the conduct of the prosecutor before the first grand jury can be expected to be minimal and cannot in any event be adequately assessed at the present stage of the case. Accordingly, even if the issues presented may not technically be moot at present, review by this Court of the court of appeals' decision is not warranted.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

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[3]It is now almost four years since the indictment was returned and more than 32 months since the district court's dismissal order. Further interlocutory review at this time might cause serious additional delay in trial of the charges in the superseding indictment against petitioner.

[4]Because the decision below was made in an interlocutory appeal and motions to dismiss the original indictment are pending in the district court, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.